

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOWARD B. HIGGINS,

Plaintiff,

No. C 07-02200 JSW

v.

FARR FINANCIAL INC., ET AL,

Defendants.

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Now before the Court is motion for summary judgment filed by Plaintiff Howard B. Higgins ("Higgins"). This matter is now fully briefed and ripe for decision. The Court finds that this matter is appropriate for disposition without oral argument and the matter is deemed submitted. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for July 22, 2011 is VACATED. Having carefully reviewed the parties' papers and the relevant legal authority, the Court hereby denies Higgins' motion for summary judgment.

BACKGROUND

Higgins brought this action against Defendants Farr Financial Incorporated's ("Farr Financial"), Zenith Investment Group LLC ("Zenith"), and George Amacechi Ozor ("Ozor") regarding Higgins' investments. Higgins now moves for summary judgment on all of his claims against Farr, Zenith and Ozor.

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ANALYSIS

A. Standards Applicable to Motions for Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is “material” if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party’s claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own evidence, “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).

In order to make this showing, the non-moving party must “identify with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact must take care adequately to point a court to the evidence precluding summary judgment

because a court is “not required to comb the record to find some reason to deny a motion for summary judgment.” *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. Higgins’ Motion for Summary Judgment.

Higgins moves for summary judgment on his claims under the Commodity Exchange Act for unauthorized trading, churning, fraud, and vicarious liability and his state-law claims for fraud, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith and fair dealing, constructive fraud pursuant to California Civil Code § 1573, and conversion. The key issue in dispute for all of these claims is whether the trades made in Higgins’ account were authorized by him. In support of his motion, Higgins primarily relies on the allegations in his complaint and the admissions which are deemed admitted by Ozor and Zenith due to their failure to respond.¹ However, allegations in a complaint are not evidence. *See Flaherty v. Warehousemen, Garage & Service Station Employees’ Local Union No. 334*, 574 F.2d 484, 486 n. 2 (9th Cir. 1978) (assertions made in complaint, legal memoranda, or oral argument are not evidence and do not create issues of fact).

Moreover, although admissions pursuant to Federal Rule of Civil Procedure 36 bind the party who makes the admission, *see Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass’n*, 465 F.3d 1102, 1111-1112 (9th Cir. 2006), admissions by one party are not binding on other parties. *See Riberglass, Inc. v. Techni-Class Indus., Inc.*, 811 F.2d 565, 566-67 (11th Cir. 1987) (admissions by guarantee and one co-guarantor not binding on other co-guarantor); *see also Castiglione v. United States Life Ins. Co.*, 262 F. Supp. 2d 1025, 1030 (D. Ariz. 2003) (“codefendants are not bound by another defendant’s admission”). The reason for this rule is two-fold. First, admissions are hearsay when they are offered against someone who

¹ Higgins also improperly relies on the Court’s Order on Farr Financial’s motion to dismiss, in which the Court found that Higgins sufficiently *alleged* an agency relationship in his complaint. The fact that Higgins stated sufficient allegations in his complaint does not automatically mean that Higgins has provided sufficient *evidence* in support of his motion for summary judgment to prove these allegations.

1 did not make the statement. It is only when they are offered against the party who made the
 2 admission, or is deemed to have made the admission, that it comes within the exception to the
 3 hearsay rule for admissions of a party opponent. *See In re Leonetti*, 28 B.R. 1003, 1009 (E.D.
 4 Penn. 1983) (citing C. Wright and A. Miller, 8 *Federal Practice and Procedure* § 2264, at 741
 5 (1970) (footnotes omitted)); *see also Alipour v. State Auto. Mutual Ins. Co.*, 131 F.R.D. 213,
 6 215-16 (N.D. Ga. 1990). Second, issues of fairness preclude the use of deemed admissions
 7 against another party. *See Allen v. Destiny's Child*, 2009 WL 2178676, * 4 (N.D. Ill. July 21,
 8 2009).

9 Despite his improper reliance on his complaint and the admissions by Ozor and Zenith,
 10 Higgins provides some evidence in support of his motion for summary judgment sufficient to
 11 shift the burden to Farr Financial. However, Farr Financial submits evidence which creates a
 12 question of fact regarding whether the trades were unauthorized.² Accordingly, the Court
 13 denies Higgins' motion for summary judgment against all defendants.

14 CONCLUSION

15 For the foregoing reasons, the Court DENIES Higgins' motion for summary judgment.
 16 Pursuant to Northern District Civil Local Rule 72-1, this matter is HEREBY REFERRED to a

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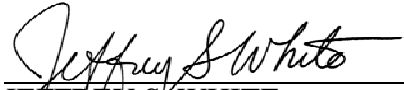
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 22 ² The Court HEREBY DENIES Higgins' motion to strike and GRANTS Farr
 23 Financial's motion to file corrected affidavits. The Court notes that Higgins' reply in support
 24 of his motion to strike and opposition to Farr Financial's motion to file corrected affidavits
 25 contains what this Court construes as evidentiary objections. The Court overrules Higgins'
 26 objections with respect to Omid Matthew Farr's statements concerning the mailing of
 27 confirmations to Higgins in paragraphs 6(a) and 6(c) of his declaration. To the extent
 28 Higgins disputes whether the confirmations were mailed to the correct address, or actually
 received by him, Higgins raises questions of fact which the Court cannot resolve on a motion
 for summary judgment. *See Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997) ("In
 considering a motion for summary judgment, the court may not weigh the evidence or make
 credibility determinations, and is required to draw all inferences in a light most favorable to
 the non-moving party."). The Court need not rule on the remainder of Higgins' evidentiary
 objections because the Court did not need to consider such evidence in order to resolve the
 motion for summary judgment.

1 randomly assigned Magistrate Judge for purposes of conducting a settlement conference, to be
2 completed within ninety days, if possible.

3 **IT IS SO ORDERED.**

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5 Dated: July 20, 2011


JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE